

# **2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE**

## **CHAPTER 11**

### **ENLISTED**

### **ADMINISTRATIVE SEPARATIONS**

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Major Charles H. Rose III  
November 2000



# **ENLISTED**

## **ADMINISTRATIVE SEPARATIONS**

### **Outline of Instruction**

#### **I. REFERENCES.**

- A. AR 135-178, Enlisted Separations (1 Sep 94) (printed in Reserve Components Personnel Update 23), w/ I02 (30 Aug 95).
- B. AR 140-111, U.S. Army Reserve Reenlistment Program (1 Sep 94) (printed in Reserve Components Personnel Update 23), w/I02 (30 Aug 95).
- C. AR 600-20, Command Policy (30 Mar 88).
- D. AR 600-37, Unfavorable Information (19 Dec 86).
- E. AR 635-200, Enlisted Personnel (17 Sep 90) (printed w/ changes in Enlisted Ranks Personnel Update 16), w/ I03 (30 Nov 94).
- F. Willis, *The Road to Hell Is Paved with Good Intentions: Finding and Fixing Unlawful Command Influence*; The Army Lawyer, August 1992 at 3.
- G. Masterton, *Urinalysis Administrative Elimination Boards in Reserve Components*, The Army Lawyer, April 1995 at 3.
- H. Reserve Officer Personnel Management Act, Pub. L. No. 103-337, Div. A, Title XVI, § 1611, 108 Stat. 2958 (1994) (codified at 10 U.S.C. §§ 14901-14907 (1996) ).

- I. Memorandum, Commander, United States Army Reserve Command, AFRC-PRO, to Commanders, USARC MSCs, subject: Delegation of Authority to Initiate and Convene Officer Involuntary Separation Boards (3 July 1997)[hereinafter Delegation Memorandum].

## **II. ENLISTED ADVERSE SEPARATION ACTIONS.**

### **A. COUNSELING AND REHABILITATIVE TRANSFERS BEFORE INITIATION OF SEPARATION ACTION.**

1. Counseling is required at least once before initiation of some separation actions. AR 135-178, para 1-12a.
2. Rehabilitative transfer within commuting distance for a minimum of 2 months is required. However, the separation authority may waive transfer.

### **B. COMMAND-INITIATED SEPARATION ACTIONS.**

1. Notification Procedures. (AR 135-178, chap 2, Section II). Generally, the immediate commander initiates the process by giving written notice. See also NGR 600-200, para 8-4. The notice must contain:
  - a) Specific allegations on which the proposed action is based.
  - b) Cite the specific provision in the regulation authorizing separation.
  - c) Advise the soldier that the separation could result in discharge, transfer to the IRR or being dropped from the roles.
  - d) State the least favorable characterization of service or a description of separation he or she could receive.
  - e) The soldier must be advised of the following rights:
    - (1) To consult with consulting counsel, or to consult with civilian counsel at no expense to the government.

- (2) To submit statements.
  - (3) To obtain copies of documents that will be sent to the separation authority.
  - (4) To present the case to an administrative board, if he or she has 6 or more years of total Regular and Reserve service or if being considered for a discharge under other than honorable conditions.
  - (5) To waive these rights in writing.
  - (6) If an intermediate commander makes a recommendation based upon additional information outside the proposed action he must give written notice to the soldier and afford him/her an opportunity to rebut the additional information. Military counsel will be made available to prepare rebuttal..
- f) The soldier will be given 30 days to respond to the notice. Failure to respond to the notice within 30 days constitutes a waiver.
  - g) The soldier has the right to submit a conditional waiver. Waivers from reservists with more than 18 years but less than 20 years of credible service cannot be accepted. AR 135-178, para 2-11c.

## 2. Administrative Board Proceedings.

- a) Notice must contain the same information as notification procedure for example: basis for separation; authority for initiation of the action; characterization of discharge. The additional notice provisions concerning the intermediate commander are also required here; see para 2-10a(4).
- b) All the rights provided in notification procedures.
- c) Soldier has a right to representation before the board by military counsel, or by civilian counsel at soldier's expense and no expense to the Government.

(1) .

3. Separation Authority action upon receipt of recommended separation packet when a board is not required. AR 135-178, para 2-7.
  - a) Determine whether sufficient basis exists to support the separation. Standard of review is a preponderance of the evidence.
  - b) If there isn't sufficient basis, disapprove the recommendation and return the case to the originating command with reasons for the disapproval.
  - c) If there is sufficient factual basis for separation, the separation authority must determine whether separation is warranted by applying the criteria in chapter 1 of Section III.
  - d) Separation Authority may:
    - (1) Direct retention.
    - (2) Direct separation.
    - (3) Suspend separation.
4. Separation Authority's Action on recommended separation packet requiring an administrative board.
  - a) If there is insufficient factual basis to support separation, return the action to originating command with reasons for disapproval.
  - b) If there is sufficient factual basis for separation determine whether separation is warranted. If separation is warranted the separation authority must convene a separation board.

C. ACTIONS OF SEPARATION AUTHORITY BEFORE BOARD HEARING.

1. Separation authority must appoint a board of at least three commissioned, warrant or noncommissioned officers. AR 135-178, para 2-12.
  - a) At least one member must be a Major or above.
  - b) A majority of the board must be commissioned or warrant officers.
  - c) Noncommissioned officers may not serve on a board when an OTH discharge could result.
  - d) Qualifications of board members.
    - (1) Experienced soldier of mature judgment.
    - (2) Impartial and fully cognizant of the regulations and policies related to separation actions.
  - e) Female or minority representation on the board is not required.
  - f) Standing board appointment orders are encouraged for administrative convenience and board member training.
2. Appearance of Respondent's Witnesses. AR 135-178, paras 2-14 and 2-15.
  - a) If the appearance will require TDY or invitational travel orders, the request must be in writing and:
    - (1) Give a synopsis of the testimony.
    - (2) Explanation of relevance of the testimony.
    - (3) Explanation why written testimony is not sufficient.
    - (4) Convening authority makes the determination.

- b) Witnesses not requiring expenditure of funds.
  - (1) Request must be in writing, and
  - (2) Specify the type of information the witness will provide.
  - (3) The board is to secure the attendance of the witness if, reasonably available and the testimony will materially add to the case.

D. SEPARATION AUTHORITY'S ACTION. AR 135-178, para 2-19.

- 1. Options when board recommends separation.
  - a) Direct separation for any reason set forth in the notification and established by the evidence.
  - b) Disapprove the recommendation and direct retention when grounds for separation are not documented in the file.
  - c) Suspend the execution of the discharge for a period not to exceed 12 months.
- 2. Options when board recommends retention.
  - a) Approve recommendation and direct retention, or
  - b) Request Secretary of the Army to discharge soldier for the convenience of the government.
- 3. Separation authority cannot direct discharge if a board recommends retention or discharge a soldier with a less favorable characterization than recommended by the board.
- 4. Options when error or defects in board action.



- a) If approving authority determines the errors to be harmless, take final action.
- b) If errors are substantial (proper objections by respondent's counsel), such as: failure to make required findings and recommendations; action which materially prejudiced a substantial right of the respondent; or there was fraud or collusion in obtaining the findings of the board the separation authority may:
  - (1) Direct retention.
  - (2) Return case to board to make findings and recommendations required by the regulation.
  - (3) Set aside the proceeding and direct a new board.

E. LIMITATION OF SEPARATION ACTIONS. AR 135-178, para 1-15.

- 1. No soldier will be considered for separation, if the conduct was subject to a judicial proceeding resulting in an acquittal or "similar action."
- 2. No soldier will be considered for separation if the conduct was subject to a prior administrative separation board in which the board determined the evidence did not sustain the factual allegation.
- 3. If the conduct was the subject of a separation action resulting in the separation authority directing retention.
- 4. Government may not initially introduce limited use information except when the action is under Chapter 8 (drug rehab failure).
- 5. Unlawful command influence in the administrative separation process may result in voiding separation action as a violation of minimal due process. See *Cooney v. Dalton*, 877 F. Supp. 508 (D. Hawaii 1995), and AR 15-6, paras. 5-7, 5-8, and AR 135-178, para. 2-15.

F. JUDGE ADVOCATE INVOLVEMENT IN THE SEPARATION PROCESS.

1. Consulting Counsel. The functions of consulting (defense) counsel to respondents are set out in the Consolidated Glossary to the Reserve Component UPDATE 23 (page 9).
2. Counsel for Representation. Performs all the duties and responsibilities of respondent's counsel as listed in the Consolidated Glossary to Reserve Component UPDATE 23 (page 9). Must perform functions in a fully independent manner. See AR 27-26, Rule 5-7.
3. Legal Review [See USARC Legal Review Checklist, Appendix C.]
  - a) No pre-board legal review is required at any stage. However, it is strongly recommended that prior to referral of an action to a separation board that a judge advocate review the action to ensure the adequacy of the notice and that there is sufficient factual basis to warrant separation, and so inform the appointing authority in writing.
  - b) Post hearing legal review only required in those cases in which the board has recommended an OTH or where the respondent identifies specific legal issue for consideration by the separation authority. AR 135-178, para 2-19.
  - c) Delegation of separation authority requires that any separation board conducted under the delegation be reviewed by a judge advocate.
4. Legal Advisor. The appointment of a legal advisor to the board is optional. However, it is recommended that whenever possible a legal advisor will be appointed. Use of Reserve military judges is encouraged; however, they must understand that evidentiary rules are relaxed, and they should not require counsel to submit written briefs on evidentiary questions or dismiss the board members when hearing argument on evidentiary matters.
5. Recorder. A nonvoting recorder may be appointed. The recorder does not have to be a judge advocate, however, it is strongly recommended that the recorder be a judge advocate.

6. Several alternate recorders and legal advisors and additional voting board members should be listed on standing board orders, so that in cases of time conflict or member disqualification, the commanding general appointing authority's staff judge advocate can excuse one and substitute another before the first session of the board, IAW AR 15-6, para 5-2a.

G. REASONS FOR SEPARATION ACTION.

1. Unsatisfactory Performance AR 135-178, Chapter 6.
  - a) If in the judgment of the commander
    - (1) The soldier will not develop sufficiently [weight program failure per AR 600-9]; or
    - (2) soldier's retention would have an adverse impact on discipline, good order and morale.
    - (3) Soldier would be disruptive.
    - (4) Potential for advancement or leadership is unlikely.
    - (5) Second consecutive APFT failure or elimination for cause from NCOES. [New provision.]
  - b) Generally, notification procedures are used in Chapter 6 actions. No board required unless soldier has more than 6 years of service.
  - c) Soldier will receive Honorable or General Discharge under honorable conditions.
2. Misconduct. AR 135-178, Chapter 7.
  - a) Minor disciplinary infractions. Relates to conduct in a military environment.

- (1) Counseling is required before separation action may be initiated.
  - (2) May utilize notification procedures.
- b) Pattern of misconduct.
  - (1) Counseling is required before separation action may be initiated.
  - (2) Conduct may have occurred in the military or civilian communities.
  - (3) Involves conduct that does not carry with it a punitive discharge.
  - (4) Must be more than one incident.
- c) Conviction by Civilian Court.
  - (1) Soldier is convicted by civil authorities and;
  - (2) A punitive discharge would be authorized for the same or similar offense under the UCMJ or the civil sentence includes confinement for 6 months or more.
  - (3) Conviction does not have to be final. If the conviction has been appealed or the soldier indicates an intention to appeal and the period for appeal has not expired, the execution of the separation will be held in abeyance until the appeal is finalized.
- d) Commission of a Serious Offense.
  - (1) Commission of military or civilian offense if a punitive discharge is authorized for the same or similar offense under the UCMJ.

- (2) Abuse of illegal drugs constitutes serious misconduct.
    - (a) Separation action must be initiated and the soldier processed for discharge if he or she has 3 years of service. Paragraph 7-11c.1(1) has been amended to coincide with AR 600-85.
    - (b) Administrative board notification should be used.
  - (3) Soldier does not have to have been in a Title 10 status at the time of the activity that gave rise to the separation action.
3. Homosexual Conduct. AR 135-178, Chapter 10 [I02, 30 Aug 95].
- a) References.
    - (1) National Defense Authorization Act (FY 1994), 10 U.S.C. § 654.
    - (2) DoDD 1332.14, Enlisted Administrative Separations, 21 December 1993; C1, 4 March 1994
    - (3) DEPSECDEF Memorandum, 17 May 1994, subject: Recoupment of Education Assistance Funds, Bonuses and Special Pay from Persons Disenrolled or Separated on the Basis of Homosexual Conduct
    - (4) DoD General Counsel memorandum, 18 August 1995, subject: Policy on Homosexual Conduct in the Armed Forces
    - (5) Message, HQDA (DAPE-MP), 010115Z MAR 94, Subject: Administrative Separation for Homosexual Conduct.
    - (6) Message, HQDA (DAPE-HR-S), 010125Z MAR 94, Subject: Homosexual Conduct Policy.

- (7) Memorandum, U.S. Army Deputy Chief of Staff for Personnel (DAPE-MPE), 28 February 1994, Subject: Accession Policy.
  - (8) Memorandum, U.S. Army Criminal Investigation Command (CIOP-PP-PO), 28 February 1994, Subject: ALCID Memorandum 008-94.
  - (9) Message, DAJA-ZX, 191425Z MAY 94, Subject: Homosexual Conduct Policy.
- b) Grounds for Separation. National Defense Authorization Act FY 94 (10 U.S.C. § 654) (Effective 30 Nov 93). Codifies homosexual exclusion policy. Requires separation of a soldier who:
- (1) "... has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts,"
  - (2) "... has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding ... that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," or
  - (3) "... has married or attempted to marry a person known to be of the same biological sex."
- c) Definitions. Several definitions are key to understanding the new legislation and its implementation. Some of the definitions are found in the statute; others are provided in the implementing DoD guidance.
- (1) **Homosexual** means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual act, and includes the terms "gay" and "lesbian". (From statute).

- (2) **Homosexual conduct** means a homosexual act, a statement by the soldier that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. (See refs e and f).
- (3) **Homosexual act** means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purposes of satisfying sexual desires; and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act (described above). (From statute).
- (4) **Homosexual statement** means language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (See ref e). Includes statement “I have a homosexual orientation.” (See ref d).
- (5) **Propensity** to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. (See refs e and f).

d) Investigations.

- (1) Only a commander in the chain of command of a suspected homosexual can authorize an investigation or inquiry.
- (2) Investigations may be initiated only when there is “credible information that there is a basis for discharge.”
- (3) “Credible Information ...”
  - (a) Exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

- (b) Does not exist, for example, when “the only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.”
- (4) Informal fact-finding inquiries and administrative separation procedures are the preferred way of addressing homosexual conduct.
- (5) Neither CID nor MPI will conduct investigations solely to determine the sexual orientation of an individual.
- (6) If the misconduct is purely private, consensual, adult misconduct, the CID may investigate only if the information is either referred to them by the unit commander, or the local CID unit receives approval to investigate from the commander or deputy commander, USACIDC.
- (7) If case involves only statements (e.g., “I am gay”), or only private, consensual, adult sexual misconduct, scope of investigation should be limited to “the factual circumstances directly relevant to the specific allegations.”
- (8) When interviewing soldiers suspected of homosexual conduct:
  - (a) The military policy on homosexual conduct should be explained to the soldier before questioning. The interviewer will not ask questions if the soldier indicates a reluctance to talk.
  - (b) Soldiers will be advised of Art 31 rights if suspected of UCMJ violation.



- (c) “Statement” case. May inquire into whether soldier has engaged in, attempted to engage in, or intends to engage in homosexual acts or marriages. May ask soldier why he or she made statement; what he or she means by it.
  - (d) “Acts” case. Discuss only the alleged conduct. May seek specific details to test credibility, to corroborate statement, to assess criminality of acts, to determine whether aggravating circumstances are present, to obtain information to counter a possible rebuttal by soldier, and to determine possible basis for recoupment by government.
  - (e) Soldiers shall not be asked to reveal sexual orientation.
- e) Separations.
  - (1) Administrative board procedure used in all enlisted cases.
  - (2) Soldiers will be separated if there is an approved finding of homosexual conduct. Exceptions:
    - (a) **Rebuttable Presumption for cases based solely on admissions.** Admission of being a homosexual or having a homosexual orientation creates a rebuttable presumption of propensity or intent to engage in homosexual acts. The burden of proof shifts to the soldier.
      - (i) In determining whether a soldier has successfully rebutted the presumption, some or all of the following may be considered (this is not an exclusive list):
        - (a) Whether the member has engaged in homosexual acts.

- (b) The member's credibility.
    - (c) Testimony from others about the members past conduct, character, and credibility.
    - (d) The nature and circumstances of the member's statements.
    - (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.
  - (ii) To date, no soldier or Marine has successfully rebutted the presumption. The Navy has retained five sailors who have admitted their homosexual orientation; the Air Force has retained two airmen.
- (b) Homosexual act committed by a heterosexual. A soldier may be retained after commission of a homosexual act if and only if the following findings are made. The soldier bears the burden of proving all the following items to the board's satisfaction:
- (i) Such conduct is a departure from the soldier's usual and customary behavior.
  - (ii) Such conduct is unlikely to recur.
  - (iii) Such conduct was not accomplished by use of force, coercion, or intimidation.
  - (iv) Under the particular circumstances of the case, soldier's continued presence is consistent with the interests of the Service in proper discipline, good order, and morale.

- (v) The soldier does not have a propensity or intent to engage in homosexual acts.
  - (c) Homosexual conduct for purposes of avoiding or terminating military service. If the commander or board believes that the individual is not a homosexual but is merely trying to avoid military service, the soldier does not have to be discharged.
- (3) Characterization of service.
- (a) Honorable, general, or entry level separation.
  - (b) Under Other Than Honorable (OTH) conditions. Authorized if, during a current term of service, the soldier attempted, solicited, or committed a homosexual act:
    - (i) By use of force, coercion, or intimidation.
    - (ii) With a person under 16 years of age.
    - (iii) With a subordinate in circumstances that violate customary military superior-subordinate relationships.
    - (iv) Openly in public view.
    - (v) For compensation.
    - (vi) Aboard a military vessel or aircraft.
    - (vii) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

- f) Reporting Requirement.
  - (1) All Army legal offices (**including reserve component**) are required to *report* pending homosexual discharge cases to OTJAG Administrative Law Division.
  - (2) Initial report made on initiation of separation action; subsequent report made following ultimate disposition.
  - (3) Report by fax (703) 693-2518; voice (703) 614-4586).
  - (4) Separation authority remains with local commanders.
- 4. Expiration of service obligation. AR 135-178, Chapter 11.
- 5. Other reasons. AR 135-178, Chapter 12.
  - a) Medically unfit for retention.
  - b) Noncitizens who are members of the ARNGUS or USAR.
  - c) Ministers of religion and divinity students.
  - d) Attainment of maximum allowable age.
- 6. Unsatisfactory Participation. AR 135-178, Chapter 13
  - a) Soldier is determined to be an unsatisfactory participant under provisions of AR 135-91, chap 4:
    - (1) Nine or more unexcused UTAs/year.
    - (2) Fails to attend or complete Annual Training.

- (3) Soldier verbally or in writing refused to comply with orders or correspondence or a second notice sent by certified mail was refused, unclaimed, or otherwise undeliverable.
  - b) Administrative board procedures apply, unless an OTH is not warranted or the SM has less than six years total military service.
  - c) All limitations on separations, rights associated with board actions, appointment of counsel apply.
7. Weight Control Failure. AR 135-178, Chapter 14
- a) Applies only to USAR soldiers who have not completed Initial Entry Training (IET) and have not been awarded an MOS.
  - b) Most USAR soldiers will be transferred to the IRR under the provisions of AR 140-10, or are boarded under Ch. 6, Unsatisfactory Performance, for weight control failure IAW AR 600-9.

### **III. RECURRING PROBLEMS IN ENLISTED SEPARATION CASES. [APPENDIX B.]**

- A. Inadequate notice to the soldier.
  - 1. Failure to state the factual basis for the separation action. Notice should tell the soldier the act or acts that were relied upon for the separation.
  - 2. Failure to state the type of discharge.
  - 3. Notification not signed by the "commander."
- B. Improper signature in the consulting counsel portion of the notification form.

1. Commanders have signed as consulting counsel. If an individual refuses to consult with counsel the commander is to annotate the form indicating that the soldier declined to consult with counsel. He or she is not to sign as consulting counsel.
  2. Other staff officers have signed as consulting counsel.
- C. Inadequate evidence to support the separation action.
1. Recorder fails to rebut evidence presented by the respondent. *United States v. Timoney*, 34 M.J. 1108 (ACMR 1992). Held: Command urinalysis results may be admissible in a courts-martial despite the government's failure to fully comply with AR 600-85 command urinalysis SOP, as to observation of soldier urination, proper urine bottle labeling, key control, and illegible SSN on specimen bottle.
  2. Failure to submit supporting evidence in the record and connecting the evidence to the respondent. [Recorder need to present live rebuttal witnesses as to soldier conduct, and providing unit urinalysis sign-in roster ledger to respondent's counsel.]
- D. Failure to provide counsel or the respondent with all the documentation and evidence that will be presented to the board.
- E. Inadequate record of the proceeding.
1. The DA Form 1574 is not the record. There is a requirement that the record reflect the admission of exhibits or documentary evidence (AR 15-6).
  2. Testimony of witnesses must be a part of the record. Para 2-16, AR 135-178 requires that the proceeding of the board be summarized as fairly and accurately as possible.
  3. Failure to record action by the legal advisor or president on challenges to board members.

4. Failure to show disposition of motions or admissions of items of evidence. Any legal issue raised during the board must be reviewed by a judge advocate. If the record does not contain the basis for the action taken by the legal advisor, how can the review take place or the separation authority determine that the proceedings were conducted properly?
- F. Failure to make findings and recommendations in accordance with the regulation.
1. The board must make specific findings on each allegation of the notification. A finding on a more serious allegation does not relieve the board of an obligation to make findings on lesser allegations.
  2. The board, if it finds the allegation is supported by a preponderance of the evidence, must determine whether the finding warrants separation.
  3. If the board determines the conduct warrants separation it must make a recommendation as to the type of discharge.
  4. A finding that an allegation has been proven does not require a finding that the conduct warrants separation. The board is free to find separation is not warranted. However, if they make such a finding they cannot make a recommendation as to the type of separation. The two things are mutually exclusive.
  5. Failure of the board to specify the assignment it recommends for a soldier that they have determined should be retained.
- G. Making findings and or recommendations not authorized by the regulation.
1. The board cannot make a finding that denies the board's jurisdiction to hear the case.
  2. The recommendation of retention cannot be conditioned upon some future action, i.e. completion of a drug rehab program. If a board wishes to ensure proper performance, they can recommend discharge but recommend suspension of the execution of the discharge for up to 12 months.
- H. Improper Delegation of Separation Authority.

1. Only delegation authorized is contained in AR 135-178, para 1-25.
2. Separation authorities may not delegate their authority to direct separation, appoint boards, direct retention, or disapprove and return an action to subordinate command, approve the findings and recommendations of a board. The separation authority must personally take these actions.
3. The "For the Commander" authority line will not be used except when the separation authority has personally approved the action but does not sign the document.

I. June 1996.

#### **IV. CONCLUSION.**



**APPENDIX A**

**THE TEN COMMANDMENTS of UNLAWFUL  
COMMAND INFLUENCE  
FOR RESERVE COMPONENT  
ADMINISTRATIVE ELIMINATION BOARDS**

- I.** The Commander May Not Order a Subordinate to Dispose of a Case in a Certain Way.
- II.** The Commander Must Not Have an Inflexible Policy on Case Disposition or Suspension of Execution of Separation.
- III.** The Commander, If Accuser, Should Not Appoint the Separation Board or Approve the Results.
- IV.** The Commander May Neither Select Nor Remove Board Members To Obtain A Particular Result In A Particular Separation Board Case.
- V.** No Outside Pressures May Be Placed on the Board Members or Legal Advisor to Arrive at a Particular Decision in a Separation Board Case.
- VI.** Witnesses May Not Be Intimidated or Discouraged From Testifying at Separation Board Proceedings.
- VII.** The Board Alone Determines Findings of Fact (Misconduct), and Recommends Separation or Retention. A Board Respondent May Not Be Unfairly Stigmatized/Punished Prior to their Board Hearing.
- VIII.** No Person May Invade the Independent Discretion of the Voting Board Members at a Separation Board Hearing.
- IX.** Commanders May Not Have an Inflexible Policy Towards Clemency.
- X.** If a Mistake is Made, Raise the Issue Immediately With Your Staff Judge Advocate.

# APPENDIX B

## **USARC GUIDE FOR ENLISTED ADMINISTRATIVE SEPARATION BOARDS**

By Major Dan Hossbach, Chief, Military Law Branch (1994, Revised 1998)

### **1. INTRODUCTION.**

This guide was developed by Major Dan Hossbach, formerly Chief, Military Law Branch, USARC SJA, with assistance from Mr. Paul Artzer, CPT Jeff Arnold and the USARC DCSPER staff in 1994. Major Hossbach's comments are still appropriate today. Please direct any comments or corrections to this guide to Lieutenant Colonel Paul Conrad, AGR, Professor, Administrative and Civil Law Division, TJAGSA, ATTN: JAGS-ADA (LTC Conrad), 600 Massie Road, Charlottesville, Virginia 22903-1781, (804) 972-6357, or toll-free (800) 552-3978(ext. 357). I will keep this publication up-to-date. Questions on USARC directed administrative boards should be directed to LTC Woofter, Chief, Military Law, USARC SJA, at Headquarters, USARC, ATTN: AFRC-JA (LTC Woofter), 1401 Deshler Street, S.W., Atlanta, GA 30330-1043, (404) 464-8193.

### **2. OVERVIEW.**

The purpose of this guide is not to dictate how your case should be presented. Rather, it is intended to help you prepare for the many eventualities that can occur in the processing of any enlisted administrative separation board. We will give you pointers on both advocacy skills as well as how to ensure that you are not caught unaware. Obviously, we cannot cover everything in great detail, but, we can provide you with our experience and hindsight so as to prevent any further occurrences of problems we have discovered in the past year. Since this guide was first developed, great progress has been made by Reserve Judge Advocate officers in fixing a number of the problems listed below. We wish to thank you for all your hard work in improving the processing of administrative elimination boards. You should also have a copy of Major Masterton's excellent article, "*Urinalysis Administrative Elimination Boards in the Reserve Components*", which appeared in the April 1995 **Army Lawyer**, at page 3. With that in mind, we hope that this guide will provide you information for use in your enlisted administrative board actions.

### **3. TOP TEN LIST OF PROBLEMS WITH BOARDS.**

From the beautiful Camp Creek Business Center in lovely downtown East Point, Georgia, the following are the top ten problems we've found from our review of the enlisted administrative separation boards sent for review:

10. Board members fail to sign the original DA Form 1574;
9. Board members are excused from attending the proceedings by an improper authority, in the alternative, there is no evidence in the record regarding the excusal of members;
8. Board members are added to the appointing order by an improper authority;
7. No reporter detailed to take and prepare summarized transcript;
6. No summarized transcript forwarded with report of proceedings;
5. The local SJA does not review the report of proceedings prior to forwarding to USARC for review;

4. The Legal Advisor to the board allows members to make unauthorized findings and recommendations;
3. Board processing takes longer than it took dinosaurs to become extinct;
2. Recorder enters litigation report from drug lab into evidence and then rests the governments case; and
1. The number one problem with enlisted administrative separation boards is the Recorder's failure to adequately paint a picture of the respondent to the board so as to convince the board to discharge the respondent.

#### 4. SOLUTIONS TO TOP TEN PROBLEMS.

While some of the ten problems listed above are easily solved, others will require a little more ingenuity. Listed below are our solutions to the top ten problems.

**10. Board members fail to sign the original DA Form 1574.** Before the board members leave, the recorder or reporter will type the verbatim findings and recommendations on the DA Form 1574 and the recorder will have the board members sign. This will save many lost hours/days waiting for the reporter to transcribe the record, record it on the DA Form 1574, and then track down and have the members sign the DA Form 1574. The recorder can complete sections I, II, and III afterwards. All that is required for the board members to sign is a verbatim recording in sections IV and V of the boards findings and recommendations .

**9. Board members are excused from attending the proceedings by an improper authority, in the alternative, there is no evidence in the record regarding the excusal of members.** The easy answer to this problem is to read the appointing order. It states that the USARC Staff Judge Advocate has been delegated the authority to excuse board members. Further AR 15-6, Procedure for Investigating Officers and Boards of Officers, 15 April 1992, paragraph 5-2a states that "if the appointing authority is a GCM convening authority or a commanding general with a legal advisor on his or her staff, the authority to excuse individual members before the first session may be delegated to the SJA or legal advisor". For USARC directed boards, that has been accomplished in your convening order. For boards that you convene locally, you must develop a delegation memorandum for your CG to sign delegating excusal authority to your SJA. In either case, the request for excusal and the SJA's approval will be in writing and the SJA excusal will be attached as an exhibit to the record of the proceedings. For using alternate members, look to AR 15-6, paragraph 5-2c. Your convening order will state that the memorandum of appointment may designate alternate members to serve on the board, in the sequence listed, if necessary to constitute a quorum in the absence of a regular member. Finally, if the president is excused, the next senior member will automatically serve as president. This should also be spelled out in your convening order.

**8. Board members are added to the appointing order by an improper authority.** The answer is that only your CG(if you have delegation of authority) or the USARC CG can add members to a board. It is a decision which requires the personal action of the CG; it cannot be delegated. That is not to say that someone with authority to sign for the commander can't sign the order, it just means that the CG has to make the decision.

**7. No reporter detailed to take and prepare summarized transcript.** While I understand the problem of resource allocation and personnel assets, a board requires the use of a recorder. It helps train your NCO's as well as enabling the recorder to concentrate on the job of presenting the governments case. In the event that a reporter is not detailed, then it is the recorders responsibility to ensure that a record of the proceedings is made. I suggest the use of a tape recorder, which is easy to operate and inconspicuous. Afterwards, it will enable the recorder to prepare the summarized transcript that is required. Don't destroy those tapes until after the results of the board have been approved by your CG or the USARC CG or ARPERSCOM, as the case may be.

**6. No summarized transcript forwarded with report of proceedings.** It is a requirement of all boards that a summarized transcript be made and included as part of the record of proceedings. AR 135-178, Separation of Enlisted Personnel, 1 September 1994, paragraph 2-16a requires that "the proceedings of the board will be summarized as fairly and accurately as possible. The proceedings will contain a" **verbatim record of the findings and recommendations**" (emphasis added). For a sample look at Appendix B to AR 635-200, Enlisted Personnel, pages 85-86 ( see Enclosure 1). If you follow that format, your records will be complete and accurately reflect what happened at your board. The reason for this requirement is to allow those that will review the proceedings (your SJA, your CG or the USARC CG or ARPERSCOM, and any review board (i.e. ABCMR)) to have a complete record to ensure that the due process requirements of the soldier were protected and that sufficient evidence was introduced to validate the boards findings and recommendations.

**5. The local SJA does not review the report of proceedings prior to forwarding to USARC for Review.** For those cases that are reviewed at USARC, we routinely find that the local SJA has not reviewed the case prior to submission to USARC. for approval. The problem with this practice is that if we find a correctable error, we must send the record back down to the local unit for correction. If the local SJA reviews it first (not the board recorder or legal advisor to the board) they will find the error and correct it before submission. This will shorten the time periods involved in the approval process considerably.

**4. The Legal Advisor to the board allows members to make unauthorized findings and recommendations.** Countless boards have been submitted with unauthorized findings and recommendations. The board will make only 1 of 2 findings. Either the soldier committed the misconduct alleged or he/she did not. The recommendations are governed by AR 135-178, paragraph 2-17. Again there are only three recommendations the board should make; (1) retention (with the type of duty that the board believes the soldier can perform satisfactorily), (b) separated (with the type of characterization of service of Honorable, General, or Under Other Than Honorable Conditions), and (3) separated but with a recommendation that separation be suspended (see AR 135-178, paragraphs 2-17g and 2-17h). If suspension is recommended, the board still must recommend a characterization of service, as the recommendation of suspension is not binding on the separation authority. Finally, the recommendation of suspension can be for no longer than 12 months (see AR 135-178, paragraph 1-16). If the legal advisor to the board reviews the boards findings and recommendations prior to their announcement, any problem as to form can be corrected and the announcement of unauthorized findings and recommendations stopped. The legal advisor should accomplish this before the board reopens for announcement of its findings and recommendations. The legal advisor should review the board's findings and recommendations for proper content and format and then allow the recorder and respondent's counsel to make any objections and they should be put on the record once the board reopens for announcement of its findings and recommendations. This process works well and it ensures that only proper findings and recommendations are made by the board.

**3. Board processing takes longer than it took the dinosaurs to become extinct.** There is no easy answer to this problem. However, several suggestions come to mind that can facilitate the timely processing of your boards. First, set up permanent boards of officers (several if necessary) so all that is required is to appoint a board to hear a case, instead of convening a new board for each case. Second, for those cases where the soldier does not respond within the time allowed, process immediately as a waiver. Be aware of and ensure that all of the requirements are complied with (see AR 135-178, paragraphs 2-6, 2-9, and 2-11). The most important is that if the "soldier refuses to consult with counsel or declines to respond as to the selection of rights, such declination will constitute a waiver of the right to consult with counsel or a waiver of rights. An appropriate annotation will be made on the form provided for the soldier's reply" (AR 135-178, para. 2-6a). The annotation will be made by the soldier's commander. Third, if you have a backlog, you need to schedule boards as often as possible to try and eliminate the backlog. If you have no backlog, scheduling more than one board per weekend will ensure that your boards become proficient at hearing cases and that your use of your time and funds is maximized.

**2. Recorder enters litigation report from the drug lab into evidence and then rests the government's case.** From our review, the most common approach for "drug" boards is that the recorder enters the litigation packet into evidence and then rests the government case. One can only wonder why this approach is not successful. Despite the evidence of use, the government must overcome the reluctance of the board members to discharge someone with a history of good performance. From my statistics, the average soldier appearing at a "drug" board is a SSG with 11 years of service. This soldier has at least three witnesses to speak on his good duty performance. It is incumbent on the recorder to have someone to testify about why the soldier should be discharged. Usually, this should be the soldier's commander, 1SGT, or first line supervisor. The Recorder should scour the respondent's 201 file and military records for other instances of misconduct or poor judgment. These can be used on rebuttal, once the soldier gets up and says what a great guy he is, or can be used to cross-examine the respondent's character witnesses. If you can get the Bn or Bde Commanders to testify, that will also help persuade the board to discharge the soldier. Later in this guide we will give you some advocacy tips that will help you achieve a favorable outcome for the government. From our perspective, it is better to give them an Honorable discharge than it is to see them drilling for years to come.

**1. The number one problem with enlisted administrative separation boards is the Recorder's failure to adequately paint a picture of the respondent to the board so as to convince the board to discharge the Respondent.** There is no solution, per se, for this problem. In the advocacy tips portion of this article, we will provide you some help in overcoming the "brownie", "passive inhalation", "my spouse spiked my (insert your own answer)", and other weird defenses that have in the past, been so successful. Suffice it to say, there are scientific articles that scientifically prove that it is unlikely that the soldier would test positive on our confirmation test if in fact they were passively exposed to or had a one time use of marijuana or cocaine.

## APPENDIX C

### USARC INVOLUNTARY SEPARATION BOARD CHECKLIST for Army Regulation 135 Series (Reserve Component) Post-Board Legal Sufficiency Review

[Developed by CPT Jeff Arnold, USARC SJA Office]

#### REVIEW OF DA FORM 1574:

##### SECTION I

\_\_\_\_\_ Is Section I properly completed? ( A Board is appointed by a Commander, not a "Headquarters".)

##### SECTION II

\_\_\_\_\_ Is Section II properly completed?

\_\_\_\_\_ Are all board personnel, including Respondent, accounted for?

\_\_\_\_\_ If a board member is absent, is there an explanation for the absence?

\_\_\_\_\_ Are absent members properly excused? If not, why ?

##### SECTION III

\_\_\_\_\_ Is Section III properly completed (including address of counsel for the Respondent)?

##### SECTION IV

\_\_\_\_\_ Were the Findings determined in closed session?

\_\_\_\_\_ Were the Findings determined by secret written ballot (officer case only)?

\_\_\_\_\_ Are the Findings verbatim?

\_\_\_\_\_ Are the Findings in compliance with AR 135-175, paragraph 2-34a (officer) or AR 135-178, paragraph 2-16b (enlisted) ?

##### SECTION V

\_\_\_\_\_ Were the recommendations determined in closed session?

\_\_\_\_\_ Were the recommendations determined by secret written ballot (officer case) ?

\_\_\_\_\_ Are the recommendations verbatim?

\_\_\_\_\_ Are the Recommendations in compliance with AR 135-175, paragraph 2-34b (officer) or AR 135-178, paragraph 2-17(enlisted) ?

#### DA FORM 1574, continued:

##### SECTION VI

\_\_\_\_\_ Is the DA Form 1574 signed by the Recorder and all voting members?

##### SECTION VII

\_\_\_\_\_ Did dissenting member(s) sign?

\_\_\_\_\_ Is there an enclosure identifying by number each finding and/or recommendation in which the dissenting member(s) do(es) not concur [minority report] ?

#### **SECTION VIII**

\_\_\_\_\_ Is the appointing authority's signature block correct?

#### **REVIEW OF SUMMARIZED TRANSCRIPT:**

\_\_\_\_\_ Is there a summarized transcript of the board proceedings?

\_\_\_\_\_ Does the transcript account for all members, including Respondent, at the beginning of each session, after each break, and after the board returns from closed session to announce the findings and recommendations?

\_\_\_\_\_ Does the transcript indicate whether the Respondent was given an opportunity to question voting members and the legal advisor for bias?

\_\_\_\_\_ Does the transcript indicate whether the Respondent challenged any voting member or the legal advisor for cause?

\_\_\_\_\_ Does the transcript include objections made by counsel for Respondent and the rulings on the objections?

\_\_\_\_\_ Does the transcript contain the summarized testimony of all witnesses?

\_\_\_\_\_ Does the transcript indicate the board was opened for announcement of Findings and Recommendations?

\_\_\_\_\_ Does the transcript indicate whether the board determined Findings and Recommendations in closed session?

\_\_\_\_\_ Does the transcript in an officer case indicate whether the board determined Findings and Recommendations in closed session by secret written ballot?

\_\_\_\_\_ Does the transcript contain verbatim Findings and Recommendations?

#### **REVIEW OF ENCLOSURES:**

\_\_\_\_\_ Is the Letter of Appointment enclosed?

\_\_\_\_\_ Are all board member excusal memoranda enclosed?

\_\_\_\_\_ Is a copy of the Notification Letter [to Respondent] enclosed?

\_\_\_\_\_ Are all Government exhibits marked and enclosed?

\_\_\_\_\_ Are all Respondent exhibits marked and enclosed?

## APPENDIX D

### ENLISTED AGR COUNSELING BOILERPLATE - DA FORM 4856, General Counseling Form

Part II, Block 8, DATE AND CIRCUMSTANCES. [State date and circumstances of incident resulting in counseling statement, and reference any attached documents and/or statements.]

Part II, Block 9, DATE AND SUMMARY OF COUNSELING.

On [month] [date], 199\_\_, I met with you, [rank] [AGR full name] [Social Security Number], to counsel you regarding the incident outlined in Part II, Block 8, above. Separation action may be initiated under AR 635-200 if this conduct continues. Such separation action may result in a characterization of service of either Uncharacterized, Honorable, General (under honorable conditions), or Other Than Honorable (OTH) Conditions. If you receive an OTH discharge, you would not be eligible for payment of accrued leave, military retirement, wear of the military uniform, admission to a soldiers home, civil service retirement credit, civil service employment preference, unemployment compensation and naturalization benefits. Also, you might not be eligible for many other important veteran's benefits. If you receive a general discharge, you would not be eligible for unemployment compensation and certain other important veteran's benefits. If you receive an honorable discharge, you would be entitled to all benefits. If you received an uncharacterized discharge, you may not be eligible for any benefits. If you receive less than an Honorable discharge, you can expect to encounter significant prejudice in civilian life. Any early separation action might result in recoupment of unearned enlistment bonuses, a loss of G.I. Bill or VEAP educational benefits, and no separation pay, if you were otherwise qualified. You should know that if such conduct continues, you may be subject to a bar to reenlistment under AR 140-111; a written reprimand under AR 600-37; reduction in grade under AR 600-200, Chapter 6; MOS reclassification under AR 140-158; an adverse NCOER evaluation report (if eligible for an NCOER) under AR 623-205, paragraph 4-27; extra training or instruction under AR 600-200, paragraph 4-6; flagging action under AR 600-8-2, and other adverse administrative action. Finally, you should also know that such conduct subjects you to punishment under the UCMJ.